

**TENAGA NASIONAL BHD****A****v.****TETUAN ARIFF & CO**

HIGH COURT MALAYA, KUALA LUMPUR

**B**

VAZEER ALAM MYDIN MEERA JC

[SUIT NO: 22NCVC-1162-10-2012]

20 SEPTEMBER 2013

**LEGAL PROFESSION:** *Solicitors - Breach of duty - Professional negligence - Whether solicitors liable in negligence for failure to file suit within time - Whether causal link existed between solicitor's negligence and loss suffered by client - Whether client entitled to recover professional fees and taxed cost*

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**UTILITIES:** *Electricity - Charge for supply - Claim for shortfall due to faulty meter - Whether proviso to reg. 11(2) Licensee Supply Regulations 1990 applied to limit retrospective adjustment - Whether plaintiff's claim limited to period not exceeding three months*

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The plaintiff, a utility company, claimed from its customer, EPE Wilson Transformer Sdn Bhd ('EPE') for the arrears in the undercharged amount due to an error in the meter reading which showed a recorded shortage of the actual usage of electricity. On 8 July 2002, the plaintiff discovered that the meter was faulty. Subsequently, a letter of demand dated 16 January 2003 ('LOD') was served on EPE demanding the correct charges for the period from January 1999 till July 2002 and the shortfall came to RM589,668.80. By a letter dated 17 April 2006, the plaintiff instructed and retained the defendant as its solicitor to institute legal proceedings against EPE to recover the shortfall amount. In the interim, the plaintiff instructed the defendant to suspend legal proceedings against EPE as an out of court settlement was being considered. As the out of court settlement could not be reached, the plaintiff *vide* letter dated 12 November 2007 instructed the defendant to proceed to file an action against EPE. However, the defendants only filed the action on 18 March 2010. Upon the application of EPE, the suit was struck out on 2 December 2010 on the ground that the action was statute barred as the suit was not filed within six years of the issuance of the LOD. The plaintiff's appeal against the striking out was denied by the appellate courts. Following the striking out of the suit, a negligence suit was instituted against the defendant and the plaintiff claimed

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- A for the sum of RM626,668.80 which comprised the shortfall sum of RM589,668.80, the taxed cost of RM31,000 and RM6,000 being the sum of professional fees paid by the plaintiff to the defendant. The plaintiff's claim was premised on the Licensee Supply Regulations 1990 ('Regulations'). Regulation 11(2) of the
- B Regulations which existed at the time of inspection of the faulty meter permitted the plaintiff to raise a claim against the defendant for any undercharge of power consumed by the consumer for any period of time. Therefore, the plaintiff contended that based on the Regulations, it was entitled to claim from EPE the short of
- C billing amount of RM589,668.80 which arose from the faulty meter in full and that had the suit been filed on time, the sum would have been recovered from EPE. The defendant, however, argued that the plaintiff was not entitled to the whole sum because, though the fault in the electricity meter was discovered on 8 July
- D 2002, the plaintiff had only served the LOD on EPE on 16 January 2003. Between the date of inspection and the date of the LOD, reg. 11(2) of the Regulations was amended. The effect of the amendment was that the period to which the plaintiff could impose retrospective charges for underbilling was limited to three
- E months from the date the consumer was informed of the undercharge. Therefore, the defendant argued that the amendment would apply as the notification to EPE on the billing and the claim for the undercharge was made only after the coming into force of the amendment. The issues that arose for determination, *inter alia*,
- F were; (i) whether the defendants were liable in negligence for failure to file the suit within time; (ii) whether the plaintiff was entitled to recover the full arrears in the undercharged amount as damages; and (iii) whether the plaintiff was entitled to recover the professional fees of RM6,000 and for the sum of RM31,000 being
- G the taxed cost ordered against the plaintiff.

**Held (defendant to pay nominal damages with costs):**

- (1) By failing to file the suit in time, the defendant had failed to exercise due care, skill and diligence in discharging its duties as solicitors of the plaintiff. It was the loss of chance of recovery of damages in the dismissed action that determined the issue of damages and not the prospect of success in the dismissed action. Before an award of damages could be made,
- H it was necessary for the plaintiff to prove that it had suffered damages which were recoverable and establish the causal link between the defendant's breach of duty and the plaintiff's loss.
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- The defendant's omission to file the suit within the limitation period had resulted in the plaintiff losing its right to have its claim against EPE prosecuted in court with the chance to recover the damages in the dismissed action. (paras 13, 15, 16, 18 & 20) A
- (2) Following the amendment to reg. 11(2), it had become imperative for the plaintiff to immediately calculate the undercharge which arose from the faulty meters and to promptly notify the customer as the back charge could only be claimed for the period of three months prior to the date of notification and not inspection. Post rectification, the meter would give accurate readings and there would not be any under billing for the period of three months if the notification was made more than three months after rectification. Thus, the plaintiff was not entitled to claim the sum of RM589,668.80 as the same was not recoverable from EPE in accordance to the amended reg. 11(2). Hence, the claim for damages under this head of claim must fail as the plaintiff had failed to prove the damages. (para 31) B  
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- (3) There was no absolute failure of consideration as the defendant had done some amount of work for the purpose of filing the suit. That expenditure was necessary in order for the plaintiff to prosecute its claim to recover its loss from EPE. The plaintiff must prove that the sum paid as professional fees to the defendant could have been recovered from EPE. Since there was no chance for the plaintiff to succeed in its claim for the sum of RM589,668.80 against EPE, the plaintiff had failed to prove that the sum of RM6,000 would have been recovered from EPE as cost in the suit. Therefore, the claim for the refund of professional fees of RM6,000 was disallowed. (paras 32 & 35) E  
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- (4) The plaintiff had failed to adduce evidence to show that it had paid out taxed cost to EPE. The defendant had paid out taxed cost out of its own pocket to forestall execution proceedings by EPE in relation to the cost awarded against the plaintiff. Therefore, the claim for RM31,000 was disallowed as the plaintiff had failed to prove that it had incurred the loss. (para 36) H  
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**A Case(s) referred to:**

*Ali Jais v. Linton Albert & Anor* [1999] 4 CLJ 167 HC (**refd**)  
*Allen v. Sir Alfred McAlpine & Sons Ltd and other appeals* [1968] 1 All ER 543 (**refd**)

*Anglia Television v. Reed* [1972] 1 QB 60 (**refd**)

**B** *Cullinane v. British Rema Manufacturing Co* [1954] 1 QB 292 (**refd**)

*Filobake Ltd v. Rondo Ltd* [2005] EWCA Civ 563 (**refd**)

*Fletcher & Son v. Jubb, Booth & Helliwell* [1920] 1 KB 275 (**refd**)

*Hock Seng Company Sdn Bhd v. Tenaga Nasional Berhad* [2000] MLJU 571 (**refd**)

*K E Hilborne & Ors v. New Ching Kee* [1978] 1 LNS 77 HC (**refd**)

**C** *Kitchen v. Royal Air Forces Association and Others* [1958] All ER 241 (**refd**)

*Law Society v. Sephton & Co (a firm) and others* [2006] 2 AC 543 (**refd**)

*Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344 CA (**refd**)

*Mahadeva Krisanon v. Teja Singh* [2011] 1 CLJ 1016 HC (**refd**)

**D** *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1)* [1984]

1 CLJ 353; [1984] 1 CLJ (Rep) 251 FC (**refd**)

*Miranda v. Khoo Yew Boon* [1967] 1 LNS 102 FC (**refd**)

*Mohd Nor Dagang Sdn Bhd v. Tetuan Mohd Yusof Endut & Associates* [2001] 2 CLJ 364 HC (**refd**)

*Neogh Soo Oh & Ors v. G Rethinasamy* [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 HC (**refd**)

**E** *Parker and another v. S J Berwin & Co and another* [2008] EWHC 3017 QB (**refd**)

*Pegasus Management Holdings SCA and another v. Ernst & Young (a firm) and another* [2010] EWCA Civ 181 (**refd**)

**F** *Penang Port Commission v. Kanawagi Seperumaniam (No. 1)* [1997] 1 CLJ 423 CA (**refd**)

*Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC (**refd**)

*Sharif and others v. Garret & Co (a firm)* [2001] 3 All ER 195 (**refd**)

*Sykt Siaw Teck Hwa Realty & Developments Sdn Bhd v. Malek & Joseph Au* [1999] 3 CLJ 184 HC (**refd**)

**G** *Tatab Industries Sdn Bhd (In Receivership) v. Su Thiam Hock @ Su Then Hack* [1994] 1 CLJ 544 HC (**refd**)**Legislation referred to:**

Licensee Supply Regulations 1990, regs. 3(1), 11(1), (2)

**H** Limitation Act 1953, s. 6(1)

*For the plaintiff - K S Lee; M/s Shearn Delamore & Co*

*For the defendant - Lim Kian Leong (Goh Gin Jhen with him); M/s Lim Kian Leong & Co*

**I** Reported by Sandra Gabriel

**JUDGMENT****A****Vazeer Alam Mydin Meera JC:**

**[1]** The plaintiff is a utility company licensed under the Electricity Supply Act 1990 to supply electricity to the public. The defendant is and was at the material time a firm of advocates and solicitors.

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**[2]** The plaintiff's customer, one EPE Wilson Transformer Sdn Bhd ("EPE"), had by letter dated 3 July 2002 (p. 1 of DCB) written to the plaintiff requesting for a reduction in the amount of the bank guarantee furnished as security for payment for power supplied to its premises at Nilai, Negeri Sembilan. Subsequent thereto, as a routine measure, the plaintiff's officers went to EPE's premises on 8 July 2002 and conducted an inspection on the power consumption meter installed thereat. The plaintiff discovered that the meter was faulty and there was an error in the meter reading, which showed a recorded shortage of 66.66% as against EPE's actual usage of electricity. The plaintiff's inspection form confirming this is found at p. 2 Bundle A.

**C****D**

**[3]** The plaintiff then decided that it had to claim for arrears in the undercharged amount from EPE. The plaintiff did a calculation of the correct charges for the period from January 1999 till July 2002 and the shortfall came to RM589,668.80. At a meeting held on 16 January 2003, the plaintiff's District Manager Puan Azlina Abd Rahman (PW3) had explained the aforesaid matter to EPE's representative and a letter of demand dated 16 January 2003 ("LOD") was served on EPE demanding payment of the undercharged amount of RM589,668.80 (see pp. 3-5 of Bundle A).

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**[4]** On or about 10 July 2003, the plaintiff had another meeting with EPE, and subsequent thereto, EPE wrote to the plaintiff *via* letter dated 5 April 2004 appealing for a reduction of the shortfall amount claimed. However, the plaintiff did not reply to that appeal.

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**[5]** The plaintiff then by letter of 17 April 2006 (p. 8 Bundle A) instructed and retained the defendant as its solicitors to institute legal proceedings against EPE to recover the shortfall amount. The retainer was accepted by the defendant *vide* its letter dated 19 April 2006 (pp. 9-10 of Bundle A). The defendant took

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A instructions and began drafting the statement of claim. In the interim, *vide* letter dated 30 November 2006 (p. 14 of Bundle A), the plaintiff instructed the defendant to suspend legal proceedings against EPE as the plaintiff was considering an out of court settlement. The plaintiff subsequently *vide* letter dated  
B 12 November 2007 (p. 15 of Bundle A) instructed the defendant to proceed to file the action against EPE as a settlement could not be reached.

C [6] However, only on or about 18 March 2010, did the defendant as solicitors for the plaintiff, file the action against EPE in the Kuala Lumpur High Court *vide* Suit No: 22NCC-513-2010 (“the suit”) demanding payment of the shortfall sum together with interest and cost.

D [7] As events would turn out, upon application by EPE, the suit was struck out by the High Court on 2 December 2010 on the grounds that the action was statute barred pursuant to s. 6(1) of the Limitation Act 1953 as the same had not been filed within six years of the issuance of the LOD on 16 January 2003. The High Court’s grounds of judgment is found at pp. 61-67 of Bundle A.  
E The Court of Appeal on 9 May 2011 affirmed the High Court’s decision and the plaintiff’s application for leave to further appeal to the Federal Court was denied on 2 August 2011. The Orders of the Court of Appeal and Federal Court are found at  
F pp. 78-79 and 121-122 of Bundle A, respectively.

G [8] Following the striking out of the suit, the plaintiff instituted this action against the defendant for negligence, claiming the sum of RM626,668.80, which comprises the shortfall sum of RM589,668.80; the taxed cost of RM31,000 ordered by the various courts to be paid by the plaintiff to EPE as cost in the suit and the related appeals; and the sum of RM6,000 being the professional fees paid by the plaintiff to the defendant under the retainer.

H [9] The law as regards to professional negligence of solicitors is well settled. Arising from the retainer, the liability of a solicitor to the client is two fold. At common law the retainer imposes upon the solicitor a duty to exercise care and skill in fulfilling his contractual obligations; a breach of which may lead to a claim for  
I damages. Apart from that, the contractual nexus also imposes liability in tort for negligence arising from the proximal relationship created under the contract of retainer. If the solicitor were to breach his duty not to injure the client by failing to do what he

had undertaken to do and the client suffers loss or damage as a result thereof, then the solicitor would be liable in an action for negligence (see *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1)* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251; [1984] 2 MLJ 39, FC; and *Neogh Soo Oh & Ors v. G Rethinasamy* [1983] 2 CLJ 218; [1983] CLJ (Rep) 663; [1984] 1 MLJ 126, HC).

[10] Therefore, it is trite that a firm of advocates and solicitors owes a duty to its clients to exercise reasonable care and competence in the discharge of its professional duties and responsibilities (see also the cases of *Mohd Nor Dagang Sdn Bhd v. Tetuan Mohd Yusof Endut & Associates* [2001] 2 CLJ 364; *K E Hilborne & Ors v. New Ching Kee* [1978] 1 LNS 77; [1979] 1 MLJ 103; *Miranda v. Khoo Yew Boon* [1967] 1 LNS 102; [1968] 1 MLJ 161; *Tatab Industries Sdn Bhd (In Receivership) v. Su Thiam Hock & Su Then Hack* [1994] 1 CLJ 544; and *Ali Jais v. Linton Albert & Anor* [1999] 4 CLJ 167; [1999] 6 MLJ 304).

[11] It is also well settled that when “a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him” grounded in an action for negligence (see *Allen v. Sir Alfred McAlpine & Sons Ltd and other appeals* [1968] 1 All ER 543). Without doubt, a solicitor has a positive duty to advise the client on issues relating to limitation of action and sufficiently warn the client when statute of limitation is about to set in. In fact it has been established by case authority that it is an act of negligence if a solicitor fails to adhere to time lines or if he delays commencing proceedings such that his client’s claim becomes statute-barred (see *Fletcher & Son v. Jubb, Booth & Helliwell* [1920] 1 KB 275 at p. 279-280; and *Mahadeva Krisanon v. Teja Singh* [2011] 1 CLJ 1016).

[12] Having considered the pleadings, the evidence and submissions of counsel, I had found that the defendant had indeed breached its duty of care owed to the plaintiff. The evidence shows that there had been a delay of two years and four months from the time of the plaintiff’s letter dated 12 November 2007 (p. 15 of Bundle A) instructing the defendant to proceed to file the action against EPE, and the date on which the suit was filed at the High Court Registry, ie, on 18 March 2010. It is also apparent from unchallenged testimony and documentary evidence that from the date of that definitive instruction on 12 November 2007 to proceed to file the action, the plaintiff had repeatedly reminded and instructed the defendant to file the action against

A EPE. This is evidenced by the plaintiff's letters/emails to the defendant dated 25 January 2008, 10 April 2008, 23 February 2009, 28 May 2009, 14 July 2008 and 8 March 2010 (pp. 16, 22, 27, 38, 47, 52 and 54 of Bundle A respectively).

B [13] Particularly glaring is the contents of plaintiff's email dated 10 April 2008 wherein the plaintiff specifically instructed the defendant as follows:

C Please proceed with the filing of Summons & Statement of Claim because it is confirmed that the consumer did not make any payment with regard to this underbilling matter. Kindly amend the SOC as per our discussion today.

D Yet, the defendant did not proceed to file the writ within time. The defendant had failed to take heed and act upon the plaintiff's instructions and by the time the suit was filed on 18 March 2010 the action had become statute-barred.

E [14] When EPE raised the issue of time bar and applied to strike out the suit, the defendant, in an attempt get out of the predicament, had advised the plaintiff to forward the argument that a letter dated 5 April 2004 from EPE is an acknowledgment of debt by EPE and as such time would be revived and start afresh from 5 April 2004 and expire on 5 April 2010. If the trial judge had accepted that argument, it would have saved the suit from the defence of limitation. The plaintiff took this advice and the defendant did advance that argument in court. However, that argument failed in the High Court as well as the Court of Appeal; and did not pass the leave stage at the Federal Court. The end result was that the suit was struck out.

G [15] The evidence clearly shows that the defendant's conduct of the plaintiff's claim against EPE had fallen well below that of a reasonably careful and competent solicitor. Thus, the defendant had failed and/or neglected to exercise due care, skill and diligence in discharging its duties as solicitors of the plaintiff.

H [16] Damage is an essential element in a cause of action for negligence (see *Pegasus Management Holdings SCA and another v. Ernst & Young (a firm) and another* [2010] EWCA Civ 181, CA; and *Law Society v. Sephton & Co (a firm) and others* [2006] 2 AC 543, HL). In this regard, the plaintiff must show loss to have actually occurred and that it is recoverable before an award of

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damages can be made (see *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 and *Penang Port Commission v. Kanawagi Seperumaniam (No. 1)* [1997] 1 CLJ 423; [1996] 3 MLJ 427). Therefore, in order to found a case in negligence, it is necessary for the plaintiff to prove that it has suffered damages that are recoverable and establish the causal link between the defendant's breach of duty and the plaintiff's loss.

[17] The plaintiff claims that it has suffered loss as a result of the action being filed out of time, in that its cause of action against EPE has been lost forever. The plaintiff submits that, it is therefore, entitled to claim from the defendant the following amount as damages:

- (a) taxed cost ordered to be paid to EPE - RM31,000
- (b) fees paid to the defendant - RM6,000
- (c) the shortfall claim against EPE - RM589,668.80

[18] It is settled that in a claim of this nature, in assessing damages arising from professional negligence of solicitors, the question is not whether the plaintiff would have succeeded in its claim against EPE; but rather whether the defendant's negligence has occasioned the plaintiff to lose a valuable right, cause of action, chance or opportunity to claim their loss. In *Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344; [2001] 2 AMR 2001, in a claim for damages against a firm of solicitors for negligence, the Court of Appeal held that negligence of the appellant solicitor by reason of non attendance in court occasioned by the appellant's failure to diarise the respondents' case meant that the respondent in that case had lost a valuable right, which is the opportunity to convince the judge of first instance by way of oral testimony and documentary evidence, that they had a complete answer to the claim that had been brought against them. (See also the cases of *Tatab Industries Sdn Bhd (In Receivership) v. Su Thiam Hock @ Su Then Hack* [1994] 1 CLJ 544; *Kitchen v. Royal Air Forces Association and Others* [1958] All ER 241; and *Allen v. Sir Alfred McAlpine & Sons Ltd and other appeals* [1968] 1 All ER 543 - where similar questions were asked in determining the causal link between the act of negligence and issue of damages). It is the loss of chance of recovery of damages

- A in the dismissed action that determines the issue of damages and not the prospect of success in that dismissed action. In fact in the case of *Sykt Siaw Teck Hwa Realty & Developments Sdn Bhd v. Malek & Joseph Au* [1999] 3 CLJ 184; [1999] 5 MLJ 588 the court held that it was indeed mischievous and unethical of the
- B solicitor to justify his breach of duty of care by raising the question of the merit of the client's appeal and its lack of prospect of success in order to defeat the client's claim for damages in an action for negligence. In *Allen v. Sir Alfred McAlpine & Sons Ltd and other appeals* [1968] 1 All ER 543 Lord Denning MR speaking
- C for the English Court of Appeal held that when an action is dismissed as a result of a solicitor's negligence, the client:

... in a subsequent action for negligence against his solicitor can recover, in addition to the costs of the action which has been dismissed, compensation for the loss of his chances of recovering damages against the defendant in the dismissed action had been properly conducted on his behalf by the solicitor.

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- [19] Further, in *Sharif and others v. Garret & Co (a firm)* [2001] 3 All ER 195, the respondent firm of solicitors were sued in
- E negligence when its client's case was struck out for want of prosecution. The Court of Appeal of England and Wales, laid down a two-tier approach to the assessment of damages. Simon Brown LJ speaking for the Court of Appeal held as follows:

- F In stating the principles generally applicable to this class of case, I indicated in *Mount v. Barker Austin (a firm)* [1998] PNLR 493 at 510, 511 a two-stage approach. First, the court has to decide whether the claimant has lost something of value or whether on the contrary his prospects of success in the original action were negligible. Secondly, assuming the claimant surmounts this initial
- G handle, the court must then 'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out'.

- H With regard to the first stage, the evidential burden rests on the negligent solicitors: they, after all, in the great majority of these cases will have been charging the claimant for their services and failing to advise him that in reality his claim was worthless so that he would be better off simply discontinuing it. The claimant, therefore, should be given the benefit of any doubts as to whether or not his original claim was doomed to inevitable failure. With
- I regard to the second stage, the *Armory v. Delamirie* (1722) 1 Stra 505, [1558-1774] All ER Rep 121 principle comes into play in

the sense that the court will tend to assess the claimant's prospects generously given that it was the defendant's negligence which has lost him the chance of succeeding in full or fuller measure.

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[20] I find that the approach taken by the Court of Appeal of England and Wales in *Sharif and others v. Garret & Co (a firm)* (*supra*) in assessing damages in a claim for solicitor's professional negligence is both practical and useful. In fact the initial determination of the question of whether the claimant has lost something of value as a result of his solicitor's breach of duty has been applied by our Court of Appeal in *Lim Soh Wah & Anor v. Wong Sin Chong & Anor (and Another Appeal)* [2001] 2 AMR 2001.

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[21] In adopting and applying that approach, I find that the plaintiff has successfully surmounted the first stage of the test, ie, that it has lost valuable right. The defendant's omission to file the suit within the limitation period has definitely resulted in the plaintiff losing its right to have its claim against EPE prosecuted in court and with that the chance of recovering damages against EPE in the dismissed action. That right has been lost forever.

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[22] I now move on to the second test, that is to 'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out'.

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[23] The plaintiff's claim for the shortfall sum of RM589,668.80 is based on the Licensee Supply Regulations 1990 ("the Regulations"). Regulation 3(1) of the Regulations provides that:

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A licensee may recover from a consumer any charges due to him in respect of the supply of electricity, or in respect of the supply and fixing of any electricity meter, supply line or electrical equipment.

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Regulation 11(1) of the Regulations goes on to say that:

The licensee shall provide and fix such meters as it consider necessary for the measurement of the supply of energy to a consumer. Where additional meters are installed by the licensee at the request of the consumer the charge as determined by the licensee shall be paid by the consumer.

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- A When EPE's meter was found to be faulty on 8 July 2002, reg. 11(2) as it then existed provided that:

B The reading of the consumer's meter shall be *prima facie* evidence of the amount of electrical energy consumed, provided that should the supply registered by the meter at any time is not equal to the energy consumed or the meter is not registering the actual consumption due to fault installation, the licensee may make a charge for the supply of energy.

- C [24] Therefore, the Regulations, in particular reg. 11(2) existing at the time of inspection of the faulty meter, permits the plaintiff to raise a claim against the defendant for any undercharge for power consumed by the consumer for any period of time. This was reaffirmed by the High Court in *Hock Seng Company Sdn Bhd v. Tenaga Nasional Berhad* [2000] MLJU 571. Therefore, plaintiff's
- D contention is that based on the Regulation it is entitled to claim from EPE, in full, the short billing amount of RM589,668.80 arising from the faulty meter. And that had the suit been filed on time, this sum would have been recoverable from EPE.

- E [25] The defendant on the other hand argues that the plaintiff is not entitled to claim the sum of RM589,668.80 from EPE as undercharge. The defendant's argument is that, though the fault in EPE's electricity meter was discovered on 8 July 2002, the plaintiff served the LOD on EPE only on 16 January 2003. The
- F High Court hearing the suit had held that the cause of action against EPE arose on 16 January 2003, ie, when the LOD was issued and the demand for payment made. The Court of Appeal has affirmed that finding.

- G [26] When the inspection was carried out at EPE's premises and the fault in the meter discovered on 8 July 2002, the actual loss incurred by the plaintiff due to the shortage in billing had not been ascertained at that point in time. In fact the plaintiff's witness Balamurugan Santharakanthan (PW5) had testified that he was not able to ascertain the billing loss at the point in time when the
- H fault in the meter was detected. PW5 had to get back to the office and report the matter to his officers and the loss would be calculated later by reference to the historical power consumption of the customer. Accordingly, the plaintiff subsequently calculated the loss and quantified the back charge only when the LOD was
- I issued on 16 January 2003.

[27] However, between the date of inspection and the date of the LOD, reg. 11(2) of the Regulation was amended. The amended reg. 11(2) came into force on 15 December 2002 and reads as follows: **A**

The reading of the consumers meter shall be *prima facie* evidence of the of electricity consumed, provided that in the event a consumer has been undercharged or overcharge as a result of: **B**

- (a) meter inaccuracy;
- (b) malfunctioning of the meter or its associated installation or part thereof; **C**
- (c) incorrect meter reading;
- (d) incorrect application of a meter multiplying constant;
- (e) cross-connection of installation to differentiate accounts; or **D**
- (f) faulty installation,

the licensee shall make retrospective adjustments to the consumer's account in respect of consumption and demand for such period by taking into consideration the licensee's records, the consumer's consumption record and history, available technical evidence and other relevant circumstances to rectify such undercharged or overcharged situation: **E**

*Provided that the period for any retrospective adjustment shall not exceed three months from the date the consumer has been informed about being undercharged or overcharged. (emphasis added)* **F**

[28] The effect of the amendment to reg. 11(2) was that the period to which the plaintiff can impose retrospective charge for under billing was limited to three months from the date the consumer was informed of the undercharge. The defendant's contention is that the date on which EPE was informed of the undercharge was the date of the LOD, which is 16 January 2003. Therefore, the defendant argues that notwithstanding the date of discovery of the fault in the meter being prior to the date of the amended reg. 11(2) coming into force, the amended reg. 11(2) would nevertheless apply in this case as the notification to EPE on the under billing and the claim for the undercharge was made only after the coming into force of the amendment. The plaintiff on the other hand argues that the date of discovery of the fault **G**  
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A should be the determinative date and thus argues that the pre-amendment r. 11(2) should apply. The plaintiff grounds that argument on the Court of Appeal decision in *Pahlawan Sdn Bhd v. Tenaga Nasional Berhad* (Unreported - Rayuan Sivil No. J-01(IM)-455-2010) where the court had held that the cause of action  
B accrued on the date when the meter was found tempered and not on the date when the appellant therein had denied liability. Therefore, the plaintiff submits that it is entitled to recover the sum of RM589,668.80 as claimed.

C [29] After considering submissions of counsel for both parties, I find that there is merit in the defendant's argument. I am bound by the finding of the Court of Appeal when in affirming the decision of the High Court in striking out the suit had held that the cause of action against EPE arose on 16 January 2003. That  
D finding was based on the facts of this case as opposed to the findings of the Court of Appeal in the *Pahlawan* case, which is fact sensitive to that case and one that relates to a case of tempering of the meter. The case before me does not deal with tempering of meter but merely a fault in the meter. On the date of accrual  
E of action and notification of the undercharge, ie, 16 January 2003, the amended reg. 11(2) was in force, and accordingly, the plaintiff would be statutorily entitled to recover the undercharge for a period of only three months immediately prior to the date of notification of the under billing. In the circumstance, the plaintiff  
F is not entitled to the undercharge for the period from January 1999 till July 2002 as claimed in the suit.

[30] The three month period prior to the date of notification for the purposes of the amended reg. 11(2) would be from 15 October 2002 to 15 January 2003. The plaintiff would be entitled to claim  
G back charge only for this period in accordance to reg. 11(2), if the same can be proved. However, there was no evidence before me as to what loss if any had been suffered by the plaintiff for this period. In fact, from the evidence, it is very clear that the issue of claiming undercharge for the period of three months prior to  
H notification, ie, from 15 October 2002 to 15 January 2003, cannot arise, as PW5 had confirmed in his testimony that on the date of inspection, ie, 8 July 2002, the fault in the meter was rectified. Thereafter, the meter would have given accurate readings of power consumption. Therefore, a claim for undercharge for the  
I period from 15 October 2002 to 15 January 2003 cannot arise and cannot be sustained in law.

[31] Following the amendment to reg. 11(2) it has now become imperative for the plaintiff to immediately calculate the undercharge arising from faulty meters and promptly notify the customer, as the back charge can only be claimed for the period of three months prior to the date of notification and not inspection. If the plaintiff were to rectify the meter on the date of inspection and notify the customer some six months later, as was the case here, the plaintiff would run the risk of not being able to claim any undercharge. Post rectification, the meter would give accurate readings, and as such there would not be any under billing for the period of three months prior thereto, if the notification is made more than three months after rectification. Thus, it is very clear to me that the plaintiff is not entitled to claim the sum of RM589,668.80, as the same is not recoverable from EPE in accordance to the amended reg. 11(2). In the premise of the foregoing, as the plaintiff has failed to prove damages, I ruled that the plaintiff's claim for general damages under this head of claim must fail.

[32] On the issue of the professional fee of RM6,000 paid by the plaintiff to the defendant, the plaintiff on strength of the ruling in *Ali Jais v. Linton Albert & Anor* [1999] 4 CLJ 167; [1999] 6 MLJ 304 submits that this amount ought to be paid back by the defendant. In *Ali Jais v. Linton Albert & Anor (supra)* the learned judge held that the plaintiff therein was entitled to recover the money paid as professional fees as it was paid on a consideration that had wholly failed. However, in the present case, I find that there is no absolute failure of consideration. The defendant had done some amount of work in taking instructions, drafting the cause papers and filing the suit. That expenditure is necessary in order for the plaintiff to prosecute its claim and recover its loss from EPE.

[33] In the authoritative text, Cordery on *Legal Services*, (LexisNexis, Issue 69 December 2012) at para 3359 it is stated that:

In compensating for expenses and liabilities that may have been incurred as a result of negligence, damages have been awarded for the cost of putting right mistakes made by a solicitor so long as the claimant acts reasonably in taking that course; for liabilities to pay third parties; for criminal penalties incurred; for expenditure wasted or rendered abortive, although the claimant must elect between this remedy and seeking to claim for the loss of gains expected from the

A        *transaction*; for sums paid to those solicitors by way of costs or  
futile action initiated as a result of negligent advice; for incidental  
expenses necessarily incurred. (emphasis added)

[34] The legal principle relating to a claim for wasted expenditure  
or abortive cost arising from negligence is similar to the principle  
involved in a breach of contract claim where a claimant has a  
choice whether to claim loss of profits or wasted expenditure -  
See *Cullinane v. British Rema Manufacturing Co* [1954] 1 QB 292,  
303; *Anglia Television v. Reed* [1972] 1 QB 60, 63H-64A; *Filobake  
Ltd v. Rondo Ltd* [2005] EWCA Civ 563. Therefore, in an action  
for negligence of this nature, the norm is that, a claimant has a  
choice whether to claim for damages arising from loss of valuable  
right or alternatively claim for wasted expenditure. However, there  
are limited circumstances where a claimant can make a claim for  
both loss of valuable right and wasted expenditure. In such  
circumstance, to recover wasted expenditure in addition to  
damages arising from the loss of a valuable right, the claimant must  
establish that there was a real and substantial chance of that  
expenditure being recovered - see *Parker and another v. Sŷ Berwin  
& Co and another* [2008] EWHC 3017 (QB).

[35] Thus, here the plaintiff must prove that the sum of RM6,000  
paid as professional fees to the defendant could have been  
recovered from EPE following conclusion of the suit in the  
plaintiff's favour. However, for reasons adumbrated above, and  
since there is no chance of the plaintiff succeeding in its claim for  
the sum of RM589,668.80 against EPE, I find that the plaintiff  
has failed to prove that the sum of RM6,000 would have been  
recovered from EPE as cost in the suit. Therefore, I disallowed  
the claim for the refund of professional fees of RM6,000.

[36] In respect of the claim for the sum of RM31,000 being the  
taxed cost ordered against the plaintiff by the High Court, Court  
of Appeal and Federal Court, in striking out the suit and  
dismissing the appeal and leave application respectively, I find that  
based on the authorities cited above, in principle, the taxed cost  
is recoverable if the same can be proved to have been incurred  
and paid. See *Ali bin Jais v. Linton Albert & Anor (supra)* - were  
the court disallowed the claim for taxed cost awarded against the  
plaintiff therein where the plaintiff had failed to show that he had  
paid out the said amount. Similarly, here, the plaintiff has also

failed to adduce evidence to show that it had paid out the taxed cost to EPE. In fact, the evidence is to the contrary, in that the defendant had paid the taxed cost out of its own pocket in order to forestall execution proceedings by EPE in relation to the cost awarded against the plaintiff. In the circumstance, I find that the plaintiff has failed to prove that it had incurred the loss of RM31,000 and accordingly I disallowed the claim for the taxed cost of RM31,000.

[37] In the circumstance, I find that in the absence of proof of damages, the plaintiff would not be entitled to anything more than nominal damages (see *Kitchen v. Royal Air Forces Association And Others* [1958] 2 All ER 241 CA). Therefore, I ordered that the defendant pay nominal damages of RM1,000 and cost of RM20,000 to the plaintiff.

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